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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 613

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal, First Appellate District, State of California.

Brief in Opposition to Motion to Dismiss

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I.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellant has raised questions of constitutional law based on uncontroverted facts, and is not, as the Board suggests, seeking a determination of factual issues. The Board's apparent argument is that because federal questions arising from uncontroverted facts were resolved against appellant by the court below they are insubstantial. Successful determination of federal questions in the court

below obviously is not a condition precedent to an appeal to this Court.

A. Due Process Required the Board to Mail Notice to the Address Designated by the Appellant.

This case illustrates the injustice of a procedure which denies a claimant for tax refund the right to designate the *precise address or addresses* to which notice shall be mailed. The injustice is particularly apparent where the taxpayer is an artificial entity, such as a corporation, which can have notice imputed to it only through natural persons. Appellant is a large corporation with thousands of employees, many offices and a number of departments. It prudently designated Mr. Chaffee E. Hall's name and address as appellant's *primary address* in this tax proceeding, and the names and addresses of the other counsel of record as its secondary address. The reason, and the only reason, for placing the names, addresses, and telephone numbers of counsel on the facing page of the Claim for Refund was to designate the persons to whom notices and other communications should be addressed. The Board carelessly disregarded this designation of addresses by appellant, and thereby caused the very injury which appellant had sought to guard against.

The requirement that a notice mailed to a taxpayer by a taxing authority be mailed to the address last given to the agency by the taxpayer was read into the Internal Revenue Act of 1924 in *Dilks v. Blair* (C.C.A. 7th, 1927), 23 F.2d 831, wherein the court made the following observation:

> "The act of 1924 did not specify how the registered notice of determination should be addressed; but provision for mailing necessarily implies an appropriate address. *It is plain that such address should be as nearly calculated to reach the taxpayer as the circum-*

stances of each particular case reasonably afford • • •.

"Assessment and collection of a tax upon a mere mailing of notice of it to the taxpayer is at best drastic and summary, though perhaps necessary, *and the least the assessing officer can do to protect the taxpayer is to send the notice to such address as will be most likely to reach him, so far as the proceedings may disclose such address.* Persons cannot conclusively be presumed to retain the same address for the many years during which such matters are often pending, *and if several addresses of the taxpayer are disclosed in the proceedings, it would entail no hardship on the Commissioner to send a copy of the notice to each address of the taxpayer which the papers and records in his possession disclose.*" (Emphasis added.)

Although the *Dilks* case involved a statutory, rather than a constitutional question, it is nevertheless a specific application of the general concepts of justice and fair play inherent in due process of law. One of the leading cases dealing expressly with the requirements of due process as relating to notices is *Mullane v. Central Hanover Tr. Co.* (1950), 339 U.S. 306. In this case the Court held a New York statute providing for service by publication of notice of settlement of accounts of a common trust fund unconstitutional as to all persons whose names and addresses were on record with the trust company. The Court's opinion reads in part as follows:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer,* 311 U.S. 457; *Grannis v. Ordean,* 234 U.S. 385; *Priest v. Las Vegas,* 232 U.S. 604; *Roller v. Holly,* 176 U.S. 398. The

notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean,* supra * * * (p. 314)

"* * * when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. (p. 315)

* * * * * * *

"* * * Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. (p. 318) * * *

"The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them *personally* of the accounting, at least by ordinary mail *to the record addresses.* (P. 318—emphasis added.)

* * * * * * *

"We hold that the notice of judicial settlement of accounts required by the New York Banking Law (§ 100-c (12)) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion." (p. 320)

B. When Notice Is a Person's Due, Process Which Does Not Inform Is Not Due Process.

The content of a notice must be such as to convey the required information.

Counsel for the Board admit that the only clue to the identity of the claim contained in the "Notice" is the stated

amount of the Claim: $324,953.94. They argue, however, that a reference to the amount, without more, constitutes sufficient identification of the particular claim. We submit that the amount of a claim does not necessarily distinguish it from any other claim, much less afford a self-sufficient identification of any particular claim. Unique facts and circumstances in the category of extrinsic evidence cannot cure the omission of an indispensable element from the face of the notice.

The omission from a notice of its date of mailing which date starts the 90-day period running, is likewise a fatal defect. Counsel for the Board argue that this date is supplied by the postmark on the envelope. They argue, in addition, that other dates, namely, the date of denial and the date of receipt, would serve the taxpayer's purpose just as well.

Postmarks are frequently illegible. Envelopes received by business organizations and law firms are customarily discarded before the contents thereof are delivered to the individual addressees. Moreover, the postmark is no part of the notice: it is stamped on the envelope; it is placed there by a *third party;* and it is added *after* the notice is deemed complete by deposit in the mail. As for the suggested use of dates other than the mailing date, due process certainly does not require the taxpayer to use at his peril dates other than the one upon which his rights depend.

C. Constructive Notice Is Vitiated by Subsequent Actual Notice to the Contrary.

To ignore a taxpayer's designated representatives in the service of notice, and subsequently to mislead them as to the status of a tax proceeding, violates the traditional notions of fair play and substantial justice implicit in due

process of law (See *Milliken v. Meyer*, 1940, 311 U.S. 457, 463). We have reference to the fact that appellant's counsel were led to believe by the Secretary and a majority of the members of the Board, before the expiration of 90 days from the mailing of the "Notice", that the Claim for Refund had not been acted upon, when in fact it had already been denied. Even if it were to be assumed that due process does not require crucial notices to be served upon counsel of record when they are the taxpayer's sole designated representatives, surely due process does prohibit the taxing agency from misleading such counsel by subsequent contradictory information which lulls them into a false sense of security while their client's claim becomes time-barred.

D. Whether a Person Is Entitled to Effective Representation by Counsel in Quasi-Judicial Proceedings Is a Question Worthy of This Court's Consideration.

The right of an individual involved in quasi-judicial proceedings to designate and rely on counsel for the preservation of his rights is surely guaranteed by the Constitution. Such representation cannot be effective unless important notices, and especially notices whose significance is apparent only to members of the legal profession, are required to be served on counsel of record. The absence of express authority is not a bar to this appeal. It is an invitation to the Court to consider the question. The increasing use of quasi-judicial agencies for the initial determination of individual rights, and the complexity of the problems presented to such agencies for determination, makes this one of the most important due process questions yet to be resolved by this Court. Section 1 of the 14th Amendment to the Constitution has been used since its adoption as the vehicle for preserving the rights of the individual in his relationship with the State through the application of concepts of basic justice and fair play.

II.

THE QUESTIONS PRESENTED WERE RAISED IN AND PASSED ON BY THE COURTS BELOW.

The right to a judicial hearing on the legality of a tax is guaranteed by the due process clause of the Fourteenth Amendment. As was pointed out in our Statement as to Jurisdiction, the basic question in this case is whether appellant has been deprived of its constitutional right to a judicial hearing. When phrasing the "Questions Presented" before this Court, we divided this basic inquiry into three subsidiary questions as follows:

1. Did the notice, in manner of service and content, meet the constitutional requirements of procedural due process of law that it be reasonably calculated under all of the circumstances to apprise appellant of the Board's denial of the claim for refund?

2. In being deprived of a trial on the merits by application of the 90-day statute of limitation, notwithstanding the fact that before the 90-day period had elapsed the Secretary and a majority of the members of the Board led appellant's counsel to believe that the claim for refund had not been acted upon, was appellant treated in accordance with the traditional notions of fair play and substantial justice implicit in due process?

3. Where counsel of record handle a quasi-judicial proceeding before an administrative body, can any procedural process of vital legal significance be valid and fulfill the requirements of procedural due process of law if such process is not served upon counsel of record?

Appellant's basic constitutional question was raised during the course of its opening statement to the trial court

(Reporter's Transcript, p. 3). Both the trial court and the California District Court of Appeal passed upon this question by holding that appellant had not been unconstitutionally denied a judicial hearing. The District Court of Appeal stated:

> "We hold that the statutory method of service of a notice of disallowance of claim by mailing addressed to the party, as here applied to the Company, is just and reasonable and satisfies due process and that, *although addressing a notice to counsel contrary to or in excess of the statutory requirements might in this case have prevented the injury, due process did not require respondent to take such a measure* * * *." (Emphasis supplied)
>
> 134 A.C.A. 181, 187, p. 7 of Appendix to Statement as to Jurisdiction.

The Board contends that only the first of appellant's three subsidiary questions was raised and passed on by the courts below. When a single basic constitutional question has been raised and passed on in the court below, the appellant is entitled and indeed required, in presenting its appeal to this Court, to relate the question and its several elements to the facts and circumstances of the case (Rule 15).

CONCLUSION

It is respectfully submitted that the motion to dismiss should be denied.

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